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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 473

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Petitioners

v.

THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., ET AL., *Respondents*

BRIEF OF THE ASSOCIATION OF AMERICAN COLLEGES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The Association of American Colleges appears before the Court as amicus curiae by reason of its interest in the resolution of the important Constitutional issues under the First and Fourteenth Amendments which have been raised in the Maryland Courts below.

The Association does not appear as the champion of any particular institutional interests but as a representative of the common interest in the form of under-

graduate education known as liberal education, wherever it may be found. The Association of American Colleges is the national organization of colleges of liberal arts and sciences, whether self-contained institutions or parts of complex universities. It admits to its membership any duly accredited institution, regardless of affiliation and governance, that devotes a substantial share of its resources to providing undergraduates with a liberal education as distinct from professional or vocational training.

The present membership of the Association in the U.S.A. (excluding four overseas institutions) comprises 869 colleges and universities. This represents over 90 percent of all accredited liberal arts colleges and nearly 60 percent of all degree-granting institutions in the United States. Of these 869, 56 percent (487 institutions) are officially classified as affiliated with one or other of the churches; 18 percent (155 institutions) are maintained by federal, state or local government, and 26 percent (227 institutions) are subject only to the authority of their own governing bodies and independent of any external control other than the public law.

All three of the colleges that are petitioners in the present action are members of the Association (as is Hood College which was a party to the case in the lower courts).

In addition to those colleges which as parties to this action are receiving state grants-in-aid the great majority of the member institutions of the amicus partici-

pate in the various federal programs of higher education. The Constitutional validity of many, if not all, of these programs as applied both to sectarian and nondenominational colleges and universities is at issue as the result of the decision of the Maryland Court of Appeals below.

The problems confronting these private institutions in providing the facilities to accommodate some part of a continually increasing college enrollment are substantial. The existence of this challenge is generally recognized in our society and requires little elaboration. What is needed, however, by the colleges is the certainty about the sources of assistance with which these institutions can plan to meet their responsibilities. In the light of the decision below, the Association respectfully urges the Court to give such direction for which there is immediate need by granting the petition for review.

The consents of both petitioners and respondents to the appearance of the Association as amicus have been filed with this brief.

ARGUMENT

I. The Issue Before the Court Is of Great Constitutional Significance and There Is Substantial Public Interest in Its Resolution.

The issue presented by the decision of the Court of Appeals of Maryland in this case is whether there is a Constitutional prohibition under the First and Fourteenth Amendments to the grant of funds by a state to private colleges for the construction of science and classroom buildings, dormitories and dining halls where such colleges are designated sectarian or denominational under certain tests prescribed by a court.

The amicus would subscribe to the characterization of this issue by petitioners and others as the most important unresolved question in the area of church-state relationships.

The substantial public interest in the settlement of this issue is rooted in the ultimate obligation of the state and federal governments together with private institutions to provide a rational program for meeting the educational needs of our people at the college and university level.

For a period beginning with the adoption of the Constitution itself, the State of Maryland has followed a clearly marked policy of supporting private as well as public institutions of higher learning. Presumably, the purpose was to encourage that pluralism which has been such a striking and vital characteristic of higher education in the United States. The support granted to private colleges and universities has been carefully restricted to non-religious purposes. In making these grants, the State of Maryland exhibited a strict neutrality not only between church related and non-church related institutions but also between the various religious denominations.

In response to current needs, programs of financial aid such as that undertaken by Maryland have been augmented by similar legislation by Congress, most notably The Higher Education Facilities Act of 1963, as amended by The Higher Education Act of 1965. Other legislation involving direct grants to private educational institutions without apparent regard to the degree of religious affiliation has been enacted since the earliest days of this republic.*

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* Ohio Company Land Sale Ordinance of July 23, 1787; Morrill Land Grant Acts 1862, 1890 (12 Stat. 503; 26 Stat. 417).

The validity of many of these programs in the Constitutional sense is brought into serious question by the decision below. The implementation of certain federal legislation requires the participation of state officials and thereby the disbursement of state funds. A divergence of opinion has arisen within the states concerning the Constitutional propriety of participation by state officials in these programs.* These differences can only be accentuated by the decision of the Maryland Court of Appeals which, by stipulating a number of factors for determining whether an institution is sectarian, has prescribed a type of religious litmus test for passing on the validity of a particular grant of aid. The difficulty in the administrative application of the tests laid down by the Maryland Court and the existence of other standards for determining recipients of public funds underline the urgency for resolution of this question.

To accommodate the expected increase in enrollment, considerable advance planning is required of the private colleges and universities to insure that the physical facilities are available at the appropriate time. The sources of funds to finance these projects are a matter of immediate concern. If the use of public funds is prohibited, other means must, if possible, be found. No part of the planning process can be carried out with the requisite precision where there is continued uncertainty in the interim about the availability of state and federal assistance.

In similar fashion, the authorities responsible for the adequacy of public institutions of higher education

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* Opinion of Department of Justice, State of Oregon, July 29, 1966.

need to know whether, through a program of financial assistance, they are entitled to rely on private institutions of a denominational character to bear a reasonable share of the burden of meeting the increasing demand for higher education.

II. The Standards Imposed by the Court Below for the Resolution of the Constitutional Issue Are Not in Accordance With the Decisions of This Court and Their Application Will Not Resolve the Question of Public Aid to Church-Related Institutions.

Having determined that the purposes of the Maryland statutes granting construction funds were secular in nature, the Court of Appeals purported to decide whether the operation of the statutes was primarily religious in effect. This inquiry was resolved by the Court through an examination of the degree of petitioners' religious orientation and the extent of their religious affiliations.

The manner of determining the effect of a statute or other official action for purposes of the First and Fourteenth Amendments seems sufficiently circumscribed in the decisions of this Court. In *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) the inquiry was concerned with whether the statute effectively advanced or inhibited religion. Other opinions of the Court have suggested that consideration must be given to the possibility of attaining secular objectives without resort to religious organisms or through a course of action which does not advance religious objectives simultaneously with the achievement of the secular goals. *McGowan* v. *Maryland,* 366 U.S. 420 (1961) (opinions of the Court and Mr. Justice Frankfurter, concurring). These opinions of the Court considered together presuppose a test of public assistance to

higher education under the First and Fourteenth Amendments which is not merely confined to an examination into the recipients of such aid and the existence or the nature of their sectarian tendencies. In so limiting its investigation, the opinion of the Maryland Court was not consistent with the decisions of this Court.

The administrative problems posed by the opinion of the Maryland Court are readily apparent. The examination of the colleges involved in this case demonstrates that from both the organization and prevailing spirit of the institutions no common denominator can be effectively derived for measuring the sectarian level which places an institution, under the Constitution, beyond the reach of public assistance in any form. A wider survey of the colleges and universities constituting the membership of the amicus reinforces the conclusion.

Under the tests laid down by the Maryland Court of Appeals, an administrator of state or federal aid is faced with an impossible task if he must assess the purposes of a college in relation to religion in terms of their "fervent, intense or passionate nature".* If the decision of the Maryland Court is allowed to stand, these same administrators must either continue to apply or to re-evaluate their own criteria for qualified recipients of financial assistance in an atmosphere of growing uncertainty. An application of the standards prescribed by the decision below or a divergence from them in subsequent actions by other lower courts, state

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* *The Horace Mann League of the United States of America, Inc., et al.* v. *Board of Public Works of Maryland, et al.*, 242 Md. 645, 675, 220 A. 2d 51, 67 (1966).